

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JILL WATERS	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	NO. 03-CV-2909
	:	
GENESIS HEALTH VENTURES,	:	
INC.	:	

MEMORANDUM ORDER

Surrick, J.

November 24, 2004

Presently before the Court is Plaintiff Jill Waters' Motion to Compel Production of Unproduced and Undisclosed Discovery Materials (Doc. No. 79) and Defendant Genesis Health Ventures, Inc.'s response thereto. (Doc. No. 86.) For the following reasons, Plaintiff's Motion is granted in part and denied in part.

The instant matter is an employment discrimination lawsuit raising claims under 42 U.S.C. § 1981 and the Americans with Disabilities Act. Plaintiff, a white female, alleges that she was terminated from her employment as a nurse for Defendant in September, 2002, by her supervisor, Marvin Kirkland, who is African-American.

At a November 2, 2004, conference with the Court, counsel for Defendant stated that Marvin Kirkland resigned from Genesis Health Ventures, Inc. because he believed that he had "come into (or would be coming into) money." Counsel indicated that this new wealth was the reason for Kirkland's departure from Defendant's employ. Counsel explained that what actually occurred was that Kirkland had been an unwitting participant in a Nigerian internet scam and that Kirkland had not, in fact, come into any money. Plaintiff's counsel contends that November 2

was the first time that he had heard of this Nigerian internet scam. Moreover, this explanation of Kirkland's reason for leaving Genesis is not completely consistent with the testimony that he gave at the time of his deposition. Plaintiff also alleges that counsel for Defendant has claimed to possess records demonstrating Kirkland's involvement with the "internet scam." Plaintiff seeks to compel production of these documents. Defendant responds that it does not possess any personal account records belonging to Kirkland and that it exercises no control over Kirkland or his financial records. (Doc. No. 86 at 3.)

Parties are permitted to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Fed. R. Civ. P. 26(b)(1). Information sought in discovery need not be admissible at trial if it "appears reasonably calculated to lead to discovery of admissible evidence." *Id.* Federal Rule of Civil Procedure 37 permits a party to bring a motion to compel disclosure if that party has received evasive or incomplete answers to a discovery request. Fed R. Civ. P. 37(a)(3). "It is well recognized that the federal rules [of civil procedure] allow broad and liberal discovery." *Pacitti v. Macy's*, 193 F.3d 766, 777 (3d Cir. 1999). Relevance is construed broadly. *See Oppenheimer Funds, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). The liberal discovery permitted by the Federal Rules of Civil Procedure ensures that no relevant facts remain hidden. *Northern v. City of Philadelphia*, Civ. A. No. 98-6517, 2000 U.S. Dist. LEXIS 4278, *1 (E.D. Pa. 2000).

Furthermore, Federal Rule of Civil Procedure 26(e) requires that counsel supplement discovery responses "if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been

made known to the other parties during the discovery process or in writing.”

We have twice ordered Defendant to provide Plaintiff with all documents related to Kirkland’s departure, whether he resigned or was terminated. (Docs. Nos. 31 & 44.) Defendant now states that it possesses no additional documentation related to Kirkland’s departure. We cannot order Defendant to provide documents that it does not have. If Plaintiff wishes to subpoena documents from Kirkland directly, counsel for Plaintiff may certainly do so.

Counsel for Defendant’s representation to the Court that Kirkland was involved in an “internet scam,” however, contradicts Kirkland’s detailed testimony in his deposition on April 30, 2004. In that deposition, Kirkland testified that he left Defendant’s employ after:

[a] former military friend of mine who left the service and went back to his home country, being Africa, became a particular head in his particular area. As a result, because of the multiple civil wars in Africa, he had to go into exile, he and his family, with the hope of eventually coming back to the United States. He needed to transfer his assets out of the country, and the only person he knew from the past was me. He searched me out, he found me, we talked and we decided how we could resolve this situation. That, because of my part of it, I was being reimbursed, and that is where the financial money came from.

(Kirkland Dep. at 457-58.) Kirkland added that his friend would be “compensating me for my services.” (*Id.* at 458.) Kirkland refused to divulge the name of his friend because he explained “this person is in exile with the possibility of being assassinated.” (*Id.*) Kirkland also refused to divulge the names of lawyers he claimed were involved with the business deal. (*Id.* at 460.) He did, however, testify that he had documentation to support this testimony. (*Id.*)

As noted above, Federal Rule of Civil Procedure 26(e) requires supplementation of discovery responses “if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been

made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e). Counsel for Defendant’s November 2 representation to the Court that Kirkland was involved with an “internet scam” indicates that she possesses new information that directly contradicted Kirkland’s prior deposition. We will direct counsel for Defendant to supplement its discovery responses to provide to Plaintiff the basis for the representation made to this Court concerning a Nigerian “internet scam.”

An appropriate Order follows.

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GENESIS HEALTH VENTURES,	:	
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ORDER

AND NOW, this 24th day of November, 2004, upon consideration of Plaintiff Jill Waters' Motion to Compel Production of Unproduced and Undisclosed Discovery Materials (Doc. No. 79, No. 03-cv-2909) and Defendant Genesis Health Ventures, Inc.'s Response (Doc. No. 86, No. 03-cv-2909), it is ORDERED that the Motion is GRANTED in part and DENIED in part.

This Motion is granted to the extent that Defendant shall provide Plaintiff with any information or documentation in its possession that supports the assertion that Marvin Kirkland left the employment of Defendant based upon the belief that he was going to secure money in what turned out to be an "internet scam." This information or documentation shall be provided to Plaintiff within ten (10) days of the date hereof. In all other respects the Motion is denied.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge

